

SULLIVAN & CROMWELL

TELEPHONE: (202) 956-7500

TELEX: 89625

FACSIMILE: (202) 293-6330

*1701 Pennsylvania Avenue, N.W.
Washington, D.C. 20006-5805*

125 BROAD STREET, NEW YORK 10004-2498

250 PARK AVENUE, NEW YORK 10177-0021

444 SOUTH FLOWER STREET, LOS ANGELES 90071-2901

8, PLACE VENDÔME, 75001 PARIS

ST. OLAVE'S HOUSE, 91 IRONMONGER LANE, LONDON EC2V 8EY

101 COLLINS STREET, MELBOURNE 3000

2-1, MARUNOUCHI 1-CHOME, CHIYODA-KU, TOKYO 100

GLOUCESTER TOWER, 11 PEDDER STREET, HONG KONG

February 21, 1995

BY HAND

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William F. Caton,
Acting Secretary,
Federal Communications Commission,
1919 M Street, N.W., Room 222,
Washington, D.C. 20554.

Re: PP Docket No. 93-253
Implementation of Section 309(j) of the
Communications Act - Competitive Bidding

Dear Mr. Caton:

On NationsBank's behalf, enclosed are an original and eleven copies of its Reply In Support of Petition for Limited Reconsideration of the Fifth Memorandum Opinion and Order in the above-captioned matter.

Please contact Patricia Diaz Dennis at (202) 956-7585 concerning this submission.

Respectfully submitted,

Patricia Diaz Dennis

Patricia Diaz Dennis
Dennis C. Sullivan

Attorneys for NationsBank

(Enclosures)

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Before the
FEDERAL COMMUNICATIONS COMMISSION
Washington, D.C. 20554

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FEDERAL COMMUNICATIONS COMMISSION
OFFICE OF SECRETARY

In the Matter of)

Implementation of Section 309(j))
of the Communications Act -)
Competitive Bidding)

PP Docket No. 93-253

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**REPLY OF NATIONSBANK
IN SUPPORT OF PETITION FOR LIMITED
RECONSIDERATION OF THE
FIFTH MEMORANDUM OPINION AND ORDER**

NationsBank

Patricia Diaz Dennis, Esq.
Dennis C. Sullivan, Esq.

Sullivan & Cromwell
1701 Pennsylvania Avenue, N.W.
Washington, D.C. 20006
(202) 956-7500

Attorneys for NationsBank

February 21, 1995

NationsBank hereby submits its Reply to the Comments of NTFC Capital Corporation ("NTFC Comments") in Support of NationsBank's Petition for Limited Reconsideration of the Fifth Memorandum Opinion and Order ("Petition") and the Petition for Reconsideration filed by National Telecom, Inc. ("NatTel" Petition).*

INTRODUCTION

NationsBank wishes to make working capital and project financing loans to designated entities ("DEs") that successfully bid in the entrepreneurs' block auctions for broadband PCS licenses. To facilitate such loans, NationsBank filed its Petition. It sought modification and supplementation of the Commission's relevant auction rules to:

1. allow the transfer** of licenses to non-DEs within the first five years of the license term in the event of default on a loan by a DE which gives a lender the right to accelerate the loan, when a DE transferee cannot be found within 180 days;

* NationsBank is responding to NatTel's Petition in the reply round of this proceeding because parts of NatTel's petition for reconsideration are, more accurately, comments or opposition to NationsBank's Petition.

** The term transfer includes assignment and, vice versa, throughout this Reply.

2. clarify that the Commission will not revoke an entrepreneurial license in the event of default on license fee installment payments to the Government but will, instead, allow the license to be sold (subject to FCC approval) in a reorganization or workout; and
3. clarify that the United States will enter into intercreditor agreements and will assert no rights to a DE licensee's assets superior to the rights of other lenders.

COMMENTERS SUPPORT PETITION

A. NTFC Comments

NTFC is, as is NationsBank, interested in making loans to DEs, provided the Commission's rules accommodate and facilitate such financing. "Like NationsBank, however, NTFC is concerned that the Commission's rules allowing the Commission to declare a PCS authorization forfeit if a DE defaults on its installment payments materially increases the risks associated with any loans to those entities."

(NTFC Comments, pp. 1-2)

NTFC also fully supports NationsBank's request that the Commission allow assignment of licenses to non-DE purchasers upon an event of default by a DE. NTFC correctly points out that the limited circumstances under which NationsBank proposes that the Commission allow such

assignments would not likely occur. Because a non-DE would be required under such circumstances to repay to the United States the DE's bidding credit, this repayment would discourage sale to a non-DE. Particularly where the license is being sold for less than the amount of the DE's outstanding obligations, a lender seeking another purchaser would be better advised to look for a DE who would not have to repay the discount and who, therefore, could afford to pay a higher price. (See NTFC Comments at p. 6, n.1)

NTFC further argues in favor of NationsBank's proposal that the FCC enter into intercreditor agreements. Thus, NTFC fully supports all three of NationsBank's proposals to the Commission.

B. NatTel Comments

NatTel, a DE interested in bidding for broadband PCS licenses, has spent the last several months attempting to obtain necessary financing to participate in the entrepreneurs' block auctions. From its actual experience, NatTel states that it found the Commission rules wanting, because NatTel has been unable to raise sufficient working capital and buildout loans--the exact loans with which NationsBank's Petition is concerned. NatTel emphasizes that, from its own experience and that of non-DEs, the only way to obtain financing for working capital and buildout is with debt financing. (NatTel Petition, pp. 1-2)

NatTel states that it has been unable to obtain the needed debt financing, because the Commission has not clearly stated in advance that lenders to DEs will hold a security interest senior to the Government's. NatTel further finds fault in the Commission's failure to clarify that the lender will be allowed to foreclose on its collateral in the event of default by the DE. (NatTel Petition, pp. 3-4, 6) NatTel's position supports the substantive concern behind NationsBank's third request regarding intercreditor agreements. Indeed, NatTel asks the Commission to give up more at an earlier date.

NationsBank supports NatTel's related request that, instead of requiring amortization of the principal over years seven through ten of the license, the Commission allow a DE to extend interest-only payments to the Government until the 10th year, at which time the DE would make a balloon payment of the principal balance. (NatTel Petition, pp. 4-6) Such a change should make the debt easier for the DE to pay and, therefore, easier for a lender to lend.

NationsBank also supports NatTel's request for an automatic grace period in the event of default of installment payments to the Government. (NatTel Petition, p. 7) However, the 90-day period NatTel requests is far too short. The Commission has stated that it would consider, on a case-by-case basis, a request for a "three to six month

grace period." (Second Report and Order, PP Docket No. 93-253, 9 F.C.C. Rcd. 2348, 2391 (1994)) The Commission should establish a set grace period of 180 days to salvage the arrangement with the existing DE licensee or negotiate a transfer to a new DE. Further, this grace period should be automatically extended, should the effort to find another DE fail, for another 180 days to give time to arrange a transfer to a non-DE. Without assurance of an adequate time within which to negotiate and finalize a workout and transfer of the license, lenders will be deterred from financing DEs in the first place.

NationsBank, however, disagrees with NatTel's bald assertion that licenses should not be transferable to non-DEs within the first five years. (NatTel Petition, p. 8) Without giving any reasons or support, NatTel asserts that "sham foreclosures" might result if such transfers were permitted. NatTel does not consider the fact that non-DEs will have to repay the DE bidding credit. The non-DEs' repayment obligation creates an inherent bidding advantage for other DEs who can bid a higher price because they do not have to factor in a bidding credit repayment. This repayment requirement would naturally discourage a transfer to non-DEs and, contrary to NatTel's unsupported assumption, create an incentive for transfers to DEs. Thus, as NTFC has noted, the Commission's flat prohibition against transfers of assignments to non-DEs within the first five years has

"little, if any, relevance when the assignment is necessitated by financial distress." (NTFC Comments, p. 5)*

NatTel's comment further ignores the commercial realities which bar such a "sham foreclosure." These include the following:

1. Foreclosure Costs. Foreclosure causes a secured lender to incur high administrative and legal costs and poses potential for lender liability. Moreover, foreclosure risks cross-defaults in obligations owed to other creditors, including equipment vendors who could seize specific assets subject to purchase money security interests. As a consequence, a lender contemplating

* The Commission has stated it would "consider exceptions to the three-year holding period on a case-by-case basis in the event of a judicial order decreeing bankruptcy or a judicial foreclosure" and if the assignment or transfer of the license were to "an entity that meets the financial thresholds for bidding in the entrepreneurs' blocks." Fifth Memorandum Opinion and Order, PP Docket No. 93-253, FCC 94-285 (released November 23, 1994) at fn. 273.

Two problems exist within this approach. First, the Commission's waiver procedure is too uncertain and unpredictable for a lender to rely upon in deciding whether to finance a DE. Second, as explained in NationsBank's Petition (at pp. 4-7) the Commission needs to clarify its rules to permit pre-bankruptcy workouts. Waiting until a bankruptcy decree is too late and is an insufficient basis upon which lenders would be willing to finance DEs.

foreclosure would be forced to pay off such other obligations or would be unable to consummate a foreclosure sale of an operating concern.

2. Transparency of Foreclosure. As suggested by the Petition, a foreclosing lender will have to have made *bona fide* efforts to find a DE purchaser for 180 days as a condition precedent to any foreclosure sale to a non-DE. The Commission could, of course, monitor a situation posing specific concern. Moreover, the Commission would have to approve any sale to a non-DE.

NationsBank agrees that every effort should be employed to assure that entrepreneurs' block licenses remain in DE hands. However, that goal should not push more DEs into financial failure by unnecessarily increasing the risk of lenders to DEs and, as a result, the debt costs to DEs. Nor should pursuit of this goal promote the risk of concentration in the DE block, because only DEs with other licenses and with the needed know how, not new DEs, are likely to purchase the licenses of failing DEs.

CONCLUSION

For the foregoing reasons, and as stated in NationsBank's Petition, the Commission should alter and clarify its PCS auction rules in the particular manner described to assure necessary financing of DEs in the entrepreneurs' blocks.

Respectfully submitted,

NationsBank

By Patricia Diaz Dennis
Patricia Diaz Dennis, Esq.
Dennis C. Sullivan, Esq.

Sullivan & Cromwell
1701 Pennsylvania Ave., N.W.
Washington, D.C. 20006
(202) 956-7500

Attorneys for NationsBank

February 21, 1995

CERTIFICATE OF SERVICE

I, David A. Lippold, hereby certify that on this 21st day of February, 1995, a copy of the foregoing Reply Of NationsBank In Support Of Petition for Limited Reconsideration of the Fifth Memorandum Opinion and Order was served by hand delivery on the following parties:

Mr. William F. Caton
Acting Secretary
Federal Communications Commission
1919 M Street, N.W., Room 222
Washington, D.C. 20554

Ruth Milkman
Federal Communications Commission
1919 M Street, N.W., Room 814
Washington, D.C. 20554

Rudolfo M. Baca
Federal Communications Commission
1919 M Street, N.W., Room 802
Washington, D.C. 20554

Mary McManus
Federal Communications Commission
1919 M Street, N.W., Room 832
Washington, D.C. 20554

Donald H. Gips
Federal Communications Commission
1919 M Street, N.W., Room 822
Washington, D.C. 20554

Lisa B. Smith
Federal Communications Commission
1919 M Street, N.W., Room 826
Washington, D.C. 20554

Jill Luckett
Federal Communications Commission
1919 M Street, N.W., Room 844
Washington, D.C. 20554

Rosalind K. Allen
Federal Communications Commission
2025 M Street, N.W., Room 5202
Washington, D.C. 20554

Jacqueline Chorney
Federal Communications Commission
2025 M Street, N.W., Room 5202
Washington, D.C.

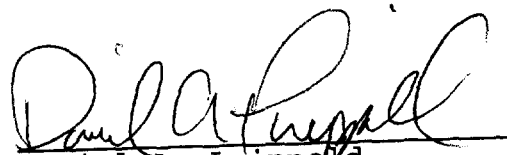
Jay D. Markley
Federal Communications Commission
2025 M Street, N.W.
Washington, D.C. 20554

Regina M. Keeney
Federal Communications Commission
2025 M Street, N.W., Room 5002
Washington, D.C. 20554

Andrew E. Sinwell
Federal Communications Commission
1919 M Street, N.W., Room 822
Washington, D.C. 20554

Theodore D. Frank
Arent, Fox, Kintner Plotkin & Kahn
1050 Connecticut Avenue, N.W.
Washington, D.C. 20036-5339 *

Jack E. Robinson
President
National Telecom, Inc.
101 Park Avenue, 26th Floor
New York, NY 10178 *


Daniel A. Luippold

* By Mail